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IN THE

Supreme Court of the United States

OCTOBER TERM 1945.

No. 954

JOSEPH MERANDO, trading as Merando Company, *Petitioner*,

v.

JOSEPH MATHY and JOHN MATHY, Co-partners, trading as the Mathy Company, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

CASES CITED.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of Joseph Merando, trading as Merando Company respectfully shows to this Honorable Court:

A.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia is found in the record at p. 362 and is also reported in 152 Fed. (2nd) 21; 74 Washington Law Reporter 74.

B.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. at L. 936; 28 U. S. C. Section 347.

2. The date of judgment to be reviewed, namely, the judgment of the United States Court of Appeals for the District of Columbia, is December 10th, 1945 (Rec. 365). Petition for rehearing was denied January 4th, 1946 (Rec. 366).

C.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Respondents, sub-contractors, (plaintiffs-appellees below), brought suit August 31, 1943 in the District Court of the United States for the District of Columbia, to recover damages for alleged breach of contract by the petitioner, a general government contractor (defendant-appellant below). On February 12, 1944, after the petitioner had completed the respondents' sub-contract he filed a counterclaim to recover his increased costs to complete. Trial was had without a jury and judgment was entered in respondents favor for the sum of $5,144.79 (Rec. 28).

The petitioner and respondents entered into a sub-contract (Rec. 315) under which respondents were to perform plumbing and sheet-metal work incident to replacing downspouts in the old Post Office and Court House in Pittsburgh, Pennsylvania. The petitioner was to "do cutting and patching in connection with brickwork, concrete, plaster, woodwork, marble, also furnish scaffold for the sheet metal work in tower" (Rec. 316). This work was to be done by the maintenance men in the Post Office, which was known by the respondents before they entered into the sub-contract (Rec. 45).

The respondents charged that they were compelled on August 12, 1943 to notify the petitioner that unless certain cutting work "was promptly done, *or* the plaintiffs authorized to do same at defendant's expense, they would have to discontinue their work" (Italics supplied) (Rec. 2) and that petitioner did not do the cutting *and* refused to permit the respondents to do the same at his expense. They further alleged that on August 16, 1943 their work had reached a stage where they could proceed no further until the cutting was done and so advised petitioner, who instead of carrying out his obligation to do the cutting, notified them on August 17, 1943, their contract was terminated (Rec. 2 and 3).

The sub-contract between the parties was dated June 7, 1943, (Rec. 315) and on June 16, 1943 the respondents were notified to proceed with their work (Rec. 318), but were unable to do so at that time because they were having trouble getting their foreman who was being held up in Boston (Rec. 225-226) and they did not proceed until July 5, 1943 (Rec. 36).

On July 27-28, 1943 the government inspector reported the job only 25 per cent completed, whereas 50 per cent would have been normal, and that the running of the downspouts was going slow because of lack of plumbers (Rec. 319).

On July 30, 1943 petitioner wrote respondents requesting that more plumbers be put to work (Rec. 322) and on August 5, 1943 wired respondents concerning progress of the work (Rec. 325).

On August 10, 1943, without any notice to the petitioner, respondents' foreman stopped petitioner's men from working (Rec. 130) and then two days later, on August 12, 1943, respondents wrote petitioner complaining about the progress of the cutting work and concluded by saying "For your information it is in the bylaws of the Pittsburgh Plumbers' Union that they do all cutting in connection with their work. You will please forward at once to our superintendent, Mr. William J. Curton, Room 1211, Hotel Keystone, Boule-

vard of the Allies and Wood Street, Pittsburgh, Pa., a written order, properly signed, authorizing *us* to do this cutting for you. Only under these conditions can we continue our work on the job." (Italics supplied) (Rec. 330).

The following day, August 13, 1943, respondents' foreman laid off his men and shut down the job (Rec. 77).

The petitioner's manager arrived in Pittsburgh on August 14, 1943 and found the job entirely shut down. Thereafter in accordance with the terms of the sub-contract he notified the respondents their sub-contract had been terminated (Rec. 336).

Thereafter petitioner, after contacting several plumbing contractors made arrangements for completion of the work covered by the sub-contract (Rec. 238, 283 and 336), which resulted in an increased cost to petitioner of approximately $9,000.00 (Rec. 342-354).

D.

QUESTIONS PRESENTED.

1. Whether the court had the right to hold the petitioner was liable in damages for breach of contract (failure to perform his part of the sub-contract), when it had found as matter of fact that respondents had stopped his men from working.

2. Whether a party can assign one reason for refusing to perform his contract and then after litigation has begun change his ground and put his conduct upon another and different consideration.

3. Whether under the terms of the sub-contract the petitioner had the right to terminate the same, in the event it was not being performed to his satisfaction.

4. Whether the court had the right to include in the judgment in favor of the respondents, anticipated profits based on information furnished by respondents' counsel to the trial justice, after the trial was over and which was not offered in evidence.

E.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The opinion of the United States Court of Appeals for the District of Columbia is based upon an apparent misunderstanding of the facts proven and found by the trial court. The undisputed facts proven and as found by the trial court were that the respondents stopped the petitioner's men from working on August 10, 1943, notwithstanding which, the appellate court in its opinion stated in part as follows: "The defendant offered no proof at the trial which would permit a finding that plaintiffs' man, either by word or deed, set up any real bar against the defendant in proceeding with the cutting work".

2. The United States Court of Appeals for the District of Columbia totally ignored the fact that the respondents stated in writing *before* they stopped work that the *only condition* upon which they could continue their work, was to receive from the petitioner an order in writing for *them* to do the cutting with plumbers, and then after suit was filed, they attempted to brush aside that condition and base their refusal to continue working upon the alleged claim that because of the failure of the petitioner to do the cutting there was no work for them to perform.

3. The United States Court of Appeals for the District of Columbia in holding that under the terms of the subcontract the petitioner did not have the right to terminate the contract in the event it was not being performed to his satisfaction has misinterpreted the decisions of this Court.

4. The United States Court of Appeals for the District of Columbia, in affirming the judgment of the lower court erroneously included in the judgment in favor of the respondents anticipated profits based upon information furnished by respondents' counsel to the trial justice after the trial was over and which had not been offered in evidence.

F.

PRAYER FOR WRIT.

Wherefore, The Premises Considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8930, January Term 1945, *Joseph Merando, Trading as Merando Company, Appellant* v. *Joseph Mathy and John Mathy, Co-partners, Trading as The Mathy Company, Appellees,* and that said judgment of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Respectfully submitted,

WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
Attorneys for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

A general statement of the case has been given under the heading "C" in the Petition for Writ of Certiorari and further facts will be referred to in the argument which follows.

II.

SPECIFICATION OF ERRORS.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the petitioner offered no proof at the trial that respondents' man stopped his men from working.

2. In totally ignoring the fact that before stopping work the respondents assigned one reason for refusing to perform their sub-contract, and then after suit was filed, changed their ground and attempted to put their refusal upon a different consideration.

3. In holding that under the terms of the sub-contract the petitioner did not have the right to terminate the same, in the event it was not being performed to his satisfaction.

4. In holding, by affirming the judgment, that the judgment could include anticipated profits based upon information furnished by respondents' counsel to the trial justice, after the trial was over, and which was not offered in evidence.

III.

ARGUMENT.

Point I.

The court erred in holding the petitioner offered no proof at the trial that respondents' man stopped his men from working.

In the court below the petitioner contended that it was the respondents' foreman Curtin who forced his employees to cease cutting and otherwise making ready for the plumbers who were the respondents' employees. As to this contention the court below stated in part as follows: "The defendant offered no proof at the trial which would permit a finding that plaintiffs' man, either by word or deed, set up any real bar against the defendant in proceeding with the cutting work" (Rec. 363).

At no time, except in the opinion of the court below has there been any dispute concerning the fact that the respondents did stop the petitioner's men from working on August 10, 1943. As a few examples of the evidence on this point we call attention to testimony of one of the respondents' witnesses, who had been in the employ of the

petitioner. Mr. McKay, one of the petitioner's employees, testified that he was ready to take the panels out but "He (respondents' foreman) stopped us from doing it" (Rec. 130). In reporting to petitioner, this same witness stated in part "I have arranged for myself and Andy Glow to take out the wooden panels wherever needed so the plumbers could work, but Curtin (respondents' foreman) is going to delay the job if I go through with it" (Rec. 324). He further testified he was ready on August 10 with his men to proceed as he had been doing, but Curtin, respondents' foreman, interfered and wouldn't let him do it (Rec. 131).

But aside from the foregoing, we have only to look to the findings of fact by the trial court, which we understand are binding on the appellate court, to substantiate the petitioner's contention. The 17th finding states in part as follows: ". . . plaintiffs' foreman stopped the maintenance men from doing further cutting (August 10) . . ." (Rec. 21).

Counsel for respondents have never advanced the claim that the respondents' foreman did not stop the petitioner's men from working, on the contrary they admitted that fact in their brief, as it stated on page 22 that on August 10 Curtin advised " . . . the maintenance men they would have to cease cutting. . . ."

With reference to any possible conflict of labor classification that may have developed the sub-contract provided as follows:

> "1. In all instances you will furnish, and pay for, all materials, necessary equipment and/or labor to perform the required work with thoroughly experienced workmen of such classification as will be acceptable to MERANDO COMPANY, their clients and any others associated with them in work of which this order is a part. In accepting this order, you waive any and all claims for damages or additional payment because of conflict of labor classification." (Rec. 317.)

We respectfully submit that the record does support the petitioner's contention in this respect, and that the act of

the respondents in stopping the petitioner's men from working constituted a breach by respondents and the lower court should have so held.

Point II.

The court erred in totally ignoring the fact that before stopping work the respondents assigned one reason for refusing to perform their sub-contract, and then after suit was filed, changed their ground and attempted to put their refusal upon a different ground.

The respondent's complaint alleged in part that on or about August 12, 1943, they were compelled to notify the petitioner that unless certain cutting work "—was promptly done, *or* the plaintiffs authorized to do same at defendant's expense, they would have to discontinue their work—" (Italics supplied). They further allege that on August 16, 1943, their work had reached a stage where they could proceed no further until said cutting was done and so advised the petitioner, who "—instead of carrying out his obligation to do said cutting—," notified respondents on August 17, 1943, their sub-contract was terminated (Rec. 2 and 3).

The evidence presented at the trial of the case showed that the respondents stopped work, not on the 16th of August, but on the 13th, and it was their contention at the trial that the reason they stopped work on August 13th was due to the fact that through failure of the petitioner to perform his part of the contract there was no work for them to perform (Rec. 77-78).

There was also presented in evidence at the trial a letter from the respondents to the petitioner dated August 12th, 1943, concluding as follows:

> "You will please forward at once to our superintendent, Mr. William J. Curtin, Room 1211, Hotel Keystone, Boulevard of the Allies & Wood Street, Pittsburgh, Pa., a written order, properly signed, authorizing *us* to do this cutting for you.
>
> *"Only under these conditions can we continue our work on the job."* (Italics supplied) (Rec. 331).

This letter was received by the petitioner on August 13th, the *same* day on which the respondents stopped all their work.

It will be seen from the foregoing that while the complaint stated that the respondents notified the petitioner, on August 12, 1943, that unless *he* did the cutting promptly *or* authorized them to do it at his expense, they would have to discontinue their work, the letter itself shows the petitioner was given no such choice, as the letter clearly states, without ambiguity, the *only* condition upon which they would continue their work, namely, *either the petitioner give them a written order authorizing them to do the cutting or they would stop.*

It is only fair to assume that they meant what they wrote, and the reason they did stop work was because the petitioner had not given them a written order authorizing *them* to do the cutting.

This phase of the case was totally ignored by the trial court and appellate court.

This Court in the case of *Railway Co.* v. *McCarthy,* 96 U. S. 258, stated the law as follows:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

We respectfully submit that aside from the fact there was nothing in the subcontract that gave the respondents the right to demand that *they* do the cutting, they having, before litigation given their reason for refusing to continue their work, can not after litigation has begun, change their ground, and claim it was because there was no work for them to perform.

Point III.

The court erred in holding that under the terms of the subcontract the petitioner did not have the right to terminate the same, in the event it was not being performed to his satisfaction.

Paragraph two of the terms and conditions of the subcontract provided as follows:

> "2. You will prosecute the work diligently, with trained organization under proper supervision, and with proper equipment. Should the workmanship or time consumed in manufacture and/or installation, *in our opinion,* be unsatisfactory or contradictory to this order, we reserve the right to terminate this agreement upon three (3) days written notice to you. Upon said termination we shall have the right to withhold all funds due on this order and to deduct from said funds the cost of satisfactorily completing the work specified. Should the cost of such satisfactory completion exceed the balance due you on this order, then you shall be liable to us for the full amount of such excess, together with damages sustained by us by reason of the delay." (Italics supplied) (Rec. 317.)

On August 17th the petitioner being dissatisfied with the performance of the sub-contract by the respondents wrote them as follows:

> "In view of the fact that you have failed to satisfactorily perform your above subcontract, please be notified that in accordance to paragraph #2 of said contract we hereby terminate said agreement to take effect within three (3) days from the receipt of this letter.
>
> We shall hold you responsible for any loss we may sustain in the matter." (Rec. 336.)

The parties having agreed in advance to leave to the petitioner the right to decide whether or not the workmanship and the time consumed was satisfactory, they were bound thereby and the lower Court should have held as a matter of law that the petitioner did have the right to

terminate the contract and hold the respondents liable for any loss he sustained.

In the case of *United States* v. *Gleason*, 171 U. S. 588, which involved a contract, there was a provision therein which provided in part that in the event the contractor should fail, *in the opinion of the engineer in charge*, to prosecute the work faithfully and diligently, the contract could be annulled by giving written notice. This Court in construing the contract stated in part as follows:

> "Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts.
>
> * * * * *
>
> * * * In other words, the parties agreed that if the contractors should fail to complete their contract within the time stipulated, they should have the benefit of the judgment of the engineer as to whether such failure was the *result of their own fault or of forces beyond their control* * * *." (Italics added.)

In the case of *Goltra* v. *Weeks*, 271 U. S. 536, which involved a lease there was a provision which gave the Secretary of War the right to terminate the lease if *in his judgment* there was a non-compliance. This Court stated as follows with reference to the right to terminate the lease.

> "The cases leave no doubt that such a provision for termination of a contract is valid, unless there is an absence of good faith in the exercise of the judgment. * * * Such a stipulation may be a harsh one or an unwise one, but it is valid and binding if entered into."

There was no finding by the lower Court that the petitioner was guilty of any fraud or bad faith, nor does the

evidence disclose any. That the respondents were behind with their work is beyond dispute. They were twenty days late in starting and on July 27-28 the Government inspection showed the work 25% completed when 50% was normal (Rec. 319). While there *may* have been a dispute as to whether there was *any* work for the respondents to perform after August 13th, that is the very reason the provision was inserted, as was stated by the Supreme Court in *United States* v. *Gleason, supra,* "Obviously the object of the provision in question was to prevent the very state of dispute and uncertainty which would be created if the present contention of the contractors were to prevail."

On this point the Court below stated in part as follows: "It is perhaps sufficient to point out that the right to terminate embodied in the contract, was extinguished by prior termination through breach." (Rec. 364). But it must be remembered that in a sense, every dispute resolves about a breach of contract, for any claim under the contract, and its denial, is predicated upon the contention that the contract does or does not require the action sought or refused. And in order to determine the question of breach it is frequently necessary to interpret the rights and obligations created by the contract and specifications, a function which this Court has recognized may be entrusted to administrative disposition. *United States* v. *McShain,* 308 U. S. 512, 520; *Plumley* v. *United States,* 226 U. S. 545, 547; *Ripley* v. *United States,* 223 U. S. 695, 704; *Sweeney* v. *United States,* 109 U. S. 618, 620.

We respectfully submit that the parties having agreed that the petitioner would have the right to terminate the contract in the event it was not being performed to his satisfaction, the lower Court should have held as matter of law that he had the legal right to terminate the same.

Point IV.

The court erred in holding, by affirming the judgment, that the judgment could include anticipated profits based upon information furnished by respondents' counsel to the trial judge, after the trial was over, and which was not offered in evidence.

The respondents' original Bill of Particulars (which is not in the record) claimed anticipated profits of $2,275.24. Their amended Bill of Particulars claimed anticipated profits of $1,956.63 (Rec. 14). After the trial was over the respondents submitted their suggested findings of fact and had attached thereto a document entitled "Plaintiffs' Profit" (Rec. 26, 27 and 28) setting forth profits of $1,423.43, which was the amount allowed by the trial court as anticipated profits (Rec. 23). It will be noted that the statement entitled "Plaintiffs' Profits" contains many items which were not included in the Amended Bill of Particulars, and contains information that was not introduced in evidence.

The evidence in the case was that at the time the respondents stopped work they had spent $1,561.00 for plumbers' wages (Rec. 304), material $1,411.15, supervision, insurance, taxes and miscellaneous $579.21 (Rec. 14) a total of $3,551.36, and using the lower court's percentage of 36% completion, if they had completed 36% of the work at a cost of $3,551.36 it would have cost them $9,864.00 to do all the work. Their contract price was $10,500.00, so even at that percentage they would only have made a profit of $636.00. We believe it only fair to call the Court's attention to the fact that based upon the evidence contained in the government's report, the work was only 30% completed, which would have shown a loss to the respondents of $1,339.00.

We respectfully submit that it was error to allow anticipated profits based upon information that was not offered in evidence.

CONCLUSION.

For the reasons stated and on the authorities cited we submit that the writ of certiorari should be granted and that the judgment should be reversed.

Respectfully submitted,

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BRIEF OF RESPONDENTS IN OPPOSITION TO ALLOWANCE OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The petition should be dismissed for the following reasons:

I

There are no questions presented (a) of general importance or (b) relating to the construction or application of the Constitution, or a treaty or statute, of the United States which have not been, but should be, settled by this court, or (c) which indicate the lower court has failed to give proper effect to an applicable decision of this court. Rule 38-5(c).

II

The errors urged are solely ones of fact and have been decided against the petitioner by the concurrent findings of the two lower courts; and, where clear error has not been shown, which counsel submits is the situation here, this court has repeatedly held it will not review the evidence. Baumgartner v. U. S., 322 U. S. 665-670; Anderson v. Kirkpatrick, 321 U. S. 349-356; Goodyear Tire & Rubber Company, Inc. v. Ray-O-Vac Company, 321 U. S. 275-278.

III

The judgment entered is in accordance with settled law for, where one party has breached a contract, the other is entitled to recover, first, his actual expenditures under the contract, and, secondly, his anticipated profits. U. S. v. Behan, 106 U. S. 338. The petitioner does not now, nor has he at any time heretofore, questioned this rule of law, but what he seeks of this court is a different determination of the facts so that recovery can be had by him under his counter-claim for damages alleged to have been sustained in completing his contract with the United States.

IV

Further, the decisions of this court sustaining validity of forfeiture provisions of the nature found in the contract have not been ignored for all of them limit its application to situations where the party taking advantage of the right reserved has acted in good faith. See Golta v. Weeks, 271 U. S. 536, where it was said:

> "The cases leave no doubt that such a provision for termination of a contract is valid, unless there is an absence of good faith in the exercise of the judgment."

And, if the petitioner here was the cause of the breach of the contract, he was not in a position to exercise an honest judgment when he attempted, after the breach, to take advantage of the forfeiture provision and relieve himself

from liability. For the lower courts to have held otherwise would have been to have permitted the petitioner to take advantage of his own wrong.

Respectfully submitted:

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